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In the Supreme Court of the United States

OCTOBER TERM, 1961

SIMONE SCOZZARI, PETITIONER

v.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 73-74; Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1962 (R. 75; Pet. App. B). The petition for a writ of certiorari was filed on April 2, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's application to the Attorney General to exercise favorably his discretion to creat-

a record of lawful admission for permanent residence under Section 249 of the Immigration and Nationality Act of 1952 could properly be denied.

STATUTES AND REGULATIONS INVOLVED

Section 5 of the Administrative Procedure Act of 1946, 60 Stat. 239, 5 U.S.C. 1004, provides in pertinent part:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *
>
> (a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. * * *
>
> (b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

Section 249 of the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 72 Stat. 546, 8 U.S.C. 1259, provides in pertinent part:

> A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may

prescribe, be made in the case of any alien * * * if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 1182(a) of this title insofar as it relates to criminals, procurers and other immoral persons, * * * and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

Immigration and Naturalization Regulation 103.2, 23 Fed. Reg. 9121, 8 C.F.R. (1964 Supp.) 103.2, provided in pertinent part:

Every formal application or petition shall be filed in accordance with the instructions contained thereon, such instructions being hereby incorporated into the particular section of the regulations requiring its submission. * * * Any required oath may be administered by an immigration officer or person generally authorized to administer oaths. The decision-rendering Service officer may, in his discretion, require the submission of additional evidence, including blood tests, may require the taking of testimony, and may direct the making of any necessary investigation. * * *

Immigration and Naturalization Regulation 249.1, 23 Fed. Reg. 6545, 8 C.F.R. 249.1, provided:

Any alien who believes that he meets the eligibility requirements enumerated in section 249 of the Act shall apply on Form N-105 to

the district director having jurisdiction over his place of residence. The applicant shall be notified of the decision and if the application is denied of the reasons therefor and of his right to appeal within 10 days from the receipt of such notification in accordance with Part 7 of this chapter. If the application is granted, a Form I–151, showing that the applicant has acquired the status of an alien lawfully admitted for permanent residence, shall not be issued until the applicant surrenders any other document in his possession evidencing compliance with the alien registration requirements of former or existing law.

STATEMENT

1. Petitioner is a 62-year-old native and citizen of Italy, who entered the United States in the summer of 1923 as a stowaway (R. 9, 23). He claims to have resided in the United States continuously since that time.

In January 1958, deportation proceedings were instituted against petitioner under several provisions of Section 241(a) of the Immigration and Nationality Act (12 U.S.C. 1251(a)).[1] After a hearing, petitioner

[1] Petitioner was charged with being deportable because he entered the United States without inspection, in violation of Section 241(a)(2) of the Act; at the time of entry he was a stowaway, in violation of Section 3 of the Act of February 5, 1917, and was therefore in an excludable class in violation of Section 241(a)(1) of the Act; at the time of entry he had no valid immigration visa in violation of the Immigration Act of 1924 and was therefore in an excludable class in violation of Section 241(a)(1) of the Act; at the time of entry he was within an excludable class in violation of Section 241(a)(1) of the Act because he had no valid passport as required by the

was ordered deported (R. 9–10). While his appeal to the Board of Immigration Appeals was pending, petitioner requested the Board to terminate the deportation proceedings and allow him an opportunity to create a record of lawful admission for permanent residence pursuant to Section 249 of the Immigration and Nationality Act of 1952, *supra*. On July 2, 1958, the Board held that the evidence was insufficient to sustain two of the deportation charges, and remanded the case for the purpose of allowing petitioner to make application for the creation of a record of lawful admission for permanent residence under Section 249 of the Act. The Board deferred final action on the three remaining deportation charges.

2. On September 8, 1958, petitioner filed with the Immigration and Naturalization Service, Los Angeles, California, an application to create a record of admission for permanent residence. On December 10, 1958, petitioner and his attorney appeared before an Immigrant Inspector. Petitioner testified and submitted documentary evidence in support of his application.

a. Petitioner's testimony showed that he entered the United States in the summer of 1923 as a stowaway on board the SS "Conte Rosso" (R. 9, 22–23). He lived with his brother in the New York area for about four years and did construction work (R. 28). In 1927, petitioner moved to California where he has resided up to the present time. He testified that he

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Passport Act of May 22, 1918; and he failed to furnish notification of address or other information required under the reporting provisions of Section 265 of the Immigration and Nationality Act of 1952, in violation of Section 241(a)(5) of the Act.

did farm work for eight or nine years until about 1936 or 1937, during which time he accumulated an aggregate amount of about $5,000 (R. 28–31). He has not worked since that time, and is now "retired" (R. 28–29).

In 1945, petitioner and a partner put up about $16,000 for the purchase of an apartment house in Hollywood, California (R. 31). Petitioner's share of the down payment, he said, came from a loan of about $7,500 or $8,000 from his brother in 1927 (R. 31, 33–34). Petitioner's brother died before 1930. Petitioner did not know the nature of his brother's business prior to his death (R. 32). Petitioner realized an income of about $150 per month from the apartment house. During this general period, petitioner invested and lost about $5,000 in a California corporation which turned out to be a financial failure (R. 35–36).

b. In 1929, petitioner filed in the district court a declaration of intention to become a United States citizen under the name of "Carlo Di Nello" (R. 37–38). The application recited that Di Nello entered the United States in January 1923 as a passenger aboard the SS "Conte Rosso" (R. 38). Petitioner testified that he did not know how he obtained the identity of Di Nello[2] (R. 38). Petitioner did not obtain United States citizenship.

Petitioner testified that there were false statements contained in his 1940 Alien Registration Form filed

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[2] The records of the Immigration and Naturalization Service showed that "Carlo Di Nello," a passenger on board the SS "Conte Rosso" in 1923, entered the United States through New York City on January 15, 1923, and was admitted for permanent residence.

with the Immigration and Naturalization Service. For example, he was never employed as a flower salesman—an occupation which he listed in the form (R. 29, 38–39).

c. Between 1929 and 1951, petitioner had been convicted on four occasions for gambling. On March 27, 1931, he was convicted for failure to report a gunshot wound to another person and his failure to summon aid (R. 36–37). In connection with the latter offense, petitioner said that he did not remember any of the details (R. 37). Petitioner was arrested on other occasions in California, and had been arrested once while serving in the Italian army (R. 36–37).

On November 14, 1957, petitioner and one Frank De Simone attended a gathering at the home of Joseph Barbara in Apalachin, New York (R. 44–46). Petitioner did not know who invited him to the gathering. He met many people at that gathering, but could not remember any of their names other than De Simone (R. 47).

d. In July 1958—after deportation proceedings had been instituted against him—petitioner married one Theresa Macri, who was a United States citizen (R. 39, 51–52). He said that he had lived with Theresa for about three or four years, during which time he and Theresa were known as "Mr. and Mrs. Macri," but that he had not lived with her as husband and wife (R. 40). Petitioner had "always promised" to marry Theresa, but *had not done so* earlier because he had been sick (R. 40–41).

On March 6, 1959, the District Director of the Immigration and Naturalization Service denied the application for discretionary relief under Section 249 of the Act on the ground that petitioner had failed to establish that he was a person of good moral character (R. 56–59). The denial was based upon petitioner's false statements contained in his 1929 and 1940 papers; his prior convictions and criminal record; his attendance at the Apalachin gathering and association with underworld figures; and his relationship with Theresa Macri prior to their marriage. On March 27, 1959, the denial was affirmed by the Acting Regional Commissioner (R. 60–62).

3. Thereafter, on May 18, 1959, petitioner's deportation hearing was resumed before the Special Inquiry Officer who had presided at the 1958 hearing. At this hearing, documents and testimony relating to petitioner's application to create a record of admission for permanent residence were introduced into evidence. On May 29, 1959, petitioner was ordered deported on the grounds (1) that he was within an excludable class of aliens at the time of his entry within Section 3 of the Act of February 5, 1917 (pertaining to stowaways), in violation of Section 241(a)(1) of the Act; (2) that he was within an excludable class of aliens at the time of his entry within the meaning of the Passport Act of May 22, 1918 (pertaining to aliens without passports or similar entry documents), in violation of Section 241(a)(1) of the Act; and (3) that he entered the United States without inspection, in violation of Section 241(a)(2) of the Act. Petitioner thereafter appealed the order

to the Board of Immigration Appeals, which, on September 28, 1959, dismissed the appeal.

4. Petitioner filed a complaint in the District Court for the Southern District of California on December 30, 1960, to enjoin the enforcement of the deportation order on the ground that the denial of his application to create a record of admission for permanent residence was unlawful, unsupported by evidence, and based upon matters *dehors* the record (R. 3-5). Thereafter, the government moved for summary judgment under Rule 56, F.R. Civ. P. After holding a hearing on the motion, the district court, on March 10, 1961, granted summary judgment for the government (R. 8-15). The court of appeals affirmed on January 26, 1962 (R. 73-74, 75; Pet. App. A, B).

ARGUMENT

Summary judgment was properly entered against petitioner by the district court because there was no genuine issue of material fact to be tried and the government was entitled to judgment as a matter of law. Rule 56, F.R. Civ. P. Petitioner's claim (Pet. 10-13) that the action of the District Director in denying relief under Section 249 of the Act was based upon evidence outside the administrative record is refuted by the fact that the record shows that petitioner failed to establish that he was a person of good moral character. The District Director found, on the basis of the information set out in the Statement, *supra*, pp. 6-7, that petitioner submitted false and fraudulent documents to the district court and the Immigration and Naturalization Service in con-

nection with his status as an alien; he possessed a criminal record which spanned two decades; he associated with known criminals; and he had lived for a considerable period of time with a woman whom he did not marry until after the deportation proceedings had begun. These findings were in considerable part based on petitioner's own testimony. Insofar as petitioner attempted to answer some of the allegations, the court below said (R. 74; Pet. App. A) that "the evasiveness and improbability of some of [his] answers under oath at one of the hearings are something that even an appellate court can see."

There is equally no merit to petitioner's contention (Pet. 6–9) that he was denied a "full and complete hearing" on his application to create a record of admission for permanent residence. Section 5 of the Administrative Procedure Act (*supra*, p. 2) requires that certain procedures be followed "[i]n every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Section 249 of the Act, however, which provides for the discretionary relief here involved, does not require that the adjudication "be determined on the record." Since the Regulations, *supra*, pp. 3–4, likewise do not provide for a formal hearing, such a hearing was not required.

Petitioner received full and fair treatment in the proceedings before the Immigrant Inspector. He was sworn as a witness and testified in support of his application. He was permitted to introduce into the record documentary evidence, including affidavits of third parties with respect to the issue of good moral

character (see R. 51-56). His attorney was present and was permitted to make objections to questions put to petitioner by the Immigrant Inspector (R. 21, 26-27, 48). The fact that the District Director concluded that petitioner had failed to establish that he was a person of good moral character of course does not mean that petitioner was denied due process or in any way treated improperly.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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